No. 15,389.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

VICTOR L. DE CASAUS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF ON APPEAL.

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Jurisdiction.

Jurisdiction is conferred by Title 28, Section 1291 and Rule 37, Rules of Criminal Procedure for the District Courts of the United States.

Statutes Involved.

Title 15, Section 714-M, and the due process clause of the Fifth Amendment of the Constitution of the United States:

> "Whoever makes any statement knowing it to be false, or whoever wilfully over values any security for the purpose of influencing in any way the action of the Corporation, or for the purpose of obtaining for himself or another, money, property, or anything of value, under sections 714-714o of this Title, or under any other Act applicable to the Corporation,

shall, upon conviction thereof, be punished by a fine of not more than $10,000 or by imprisonment by not more than five years, or both."

Amendment 5 to the Constitution of the United States.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statement of the Case.

The Appellant was convicted of Count 4 of an indictment charging him with making a statement knowing it to be false for the purpose of influencing the action of the Commodity Credit Corporation, an agency of the United States, in that in a conversation with Doyle S. Kennedy, a special agent of the Department of Agriculture, he told Mr. Kennedy that as of October 6, 1954, Casaus, Inc., had exported to the Republic of Mexico, 15,424 cwt. of lima beans which Casaus, Inc., had purchased from the Commodity Credit Corporation when in truth and in fact a much lesser quantity of such beans had actually been exported to the Republic of Mexico. The various counts of the indictment except Counts 2 and 4 were dismissed by the trial judge and the jury acquitted the defendant of Count 2 of the indictment containing purported charges of a statement allegedly made to Special Agent Kennedy in May of 1954.

The case involved a conversation with an agent of the Agricultural Department, Doyle S. Kennedy, who was checking the records of a company for which the defendant worked and involved the question of the shipment of lima beans from the Commodity Credit Corporation into Mexico. The agent spent several days checking books and records and invoices. After the agent had completed his investigation, the matter was apparently closed until the defendant was arrested on the state court charge involving a traffic accident on the freeway and which resulted in considerable publicity. It was almost 11 months later that the present indictment was brought. After the bringing of the indictment the court denied a request for a Bill of Particulars as to the quantity of beans it was claimed by the Government had been actually transported into Mexico. Considerable time was consumed in the trial with the testimony of Doyle S. Kennedy and his check on the books and records of the corporation. He was the lone witness as to the purported statement alleged in the indictment, but nowhere at any time did he testify to the statement as testified in the indictment.

During the course of the trial the defendant demanded the right to inspect and produce government records from the American Customs House in Calexico and San Ysidro in order to show the government records as to the quantity of the beans actually transported by Casaus, Inc., into Mexico, according to American Customs' records. The defense, on the objections of the Government, was refused the right to inspect these records or have them produced in the trial although the Customs House brought their records into the courtroom on the subpoena of the defense.

This is an assigned prejudicial and reversible error.

The defense also requested permission to take depositions in Mexico before a judge of the Mexican Court and to produce this testimony. The court refused this application, also.

The defense produced Luis Orozco, an official of the Mexican Federal Government, to testify regarding Mexican records of beans imported into Mexico and proof that these beans were actually imported. The Court declined in part to receive this evidence and instructed the jury that there was no treaty with Mexico regarding the subject of perjury.

Specification of Errors.

I.

THE EVIDENCE IS INSUFFICIENT TO JUSTIFY THE VERDICT. THE VERDICT IS CONTRARY TO THE LAW AND THE EVIDENCE.

There was no evidence that the defendant ever made a statement as alleged in Count 4 of the indictment to Special Agent Doyle S. Kennedy, "that as of October 6, 1954, Casaus, Inc., exported to the Republic of Mexico 15,424 cwt. of lima beans which Casaus had purchased from the Commodity Credit Corporation."

II.

THERE WAS NO PROOF THAT THE DEFENDANT MADE ANY STATEMENT FOR THE PURPOSE OF OBTAINING MONEY OR PROPERTY OR OTHER THINGS OF VALUE FOR HIMSELF. THERE WAS NO PROOF AS TO THE "LESSER QUANTITY" ASSERTED BY THE GOVERNMENT.

III.

THE RULE OF PERJURY REQUIRING TWO WITNESSES TO ANY ALLEGED FALSE STATEMENT SHOULD APPLY.

There was only one witness to the purported conversation, to wit: Doyle S. Kennedy, the investigator and the defendant to whom he talked who contradicted him.

IV.

THE STATUTE WAS NOT MEANT TO APPLY TO INVESTIGATING OFFICERS.

Section 714 m(a) has been unconstitutionally construed and applied.

V.

THE INDICTMENT AS TO COUNTS 4 FAILS TO STATE AN OFFENSE AGAINST THE LAWS OF THE UNITED STATES.

VI.

THE COURT ERRED IN DENYING APPELLANT THE REQUEST FOR A BILL OF PARTICULARS AS TO THE "MUCH LESSER QUANTITY OF SUCH BEANS" OR THE ACTUAL QUANTITY OF BEANS WHICH THE GOVERNMENT CLAIMS HAD ACTUALLY BEEN EXPORTED TO THE REPUBLIC OF MEXICO.

VII.

THE COURT ERRED IN REFUSING TO ALLOW THE DEFENDANT TO HAVE THE GOVERNMENT RECORDS OF THE UNITED STATES CUSTOMS OFFICE PRODUCED AND PRESENTED FOR INSPECTION AND USE IN THE TRIAL. THE DENIAL OF THE RIGHT TO HAVE THOSE DOCUMENTS BY THE GOVERNMENT REQUIRES IT TO "DISMISS THE CASE."

VIII.

THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE DEFENDANT TO TAKE DEPOSITIONS IN MEXICO AS REQUESTED BY THE DEFENSE AND PURSUANT TO TITLE 28, SECTION 1781-1782, UNITED STATES CODES.

IX.

THE TRIAL COURT ERRED IN REFUSING TO PERMIT THE INTRODUCTION INTO EVIDENCE OF MEXICAN LANDING RECEIPTS CERTIFIED TO BY THE MEXICAN GOVERNMENT. SAID PROOF WAS AUTHORIZED BY GOVERNMENT REGULATION 212.

X.

THE TRIAL COURT ERRED IN NOT GRANTING A JUDGMENT AS TO COUNT IV OF ACQUITTAL AT THE CLOSE OF THE GOVERNMENT'S CASE AND AT THE CLOSE OF THE ENTIRE CASE. THIS COURT SHOULD DIRECT IT TO ENTER A JUDGMENT OF ACQUITTAL.

XI.

THE TRIAL COURT ERRED IN DENYING A MOTION FOR A NEW TRIAL WHEN IT WAS DISCLOSED ON THE MOTION FOR THE NEW TRIAL THAT THE MARSHAL HAD INADVERTENTLY SENT EXHIBITS TO THE JURY ROOM WHICH HAD NOT BEEN INTRODUCED IN EVIDENCE.

The defendant had requested and the Customs House had produced, the records of the United States Customs Department. but the Court, on objections of the Government, had refused to let these documents be either inspected or produced on the claim that they were privileged and confidential, hence, that although it appears that the Government Agent, Kennedy, was able to see them, the defense was not. Certainly, this is not even-handed justice and it is a denial of fair trial guaranteed by the Fifth Amendment to the Constitution of the United States.

ARGUMENT.

I.

The Evidence Is Insufficient to Justify the Verdict. The Verdict Is Contrary to the Law and the Evidence.

There was no evidence that the defendant ever made a statement as alleged in Count 4 of the indictment "to Special Agent Doyle S. Kennedy, that as of October 6, 1954, Casaus, Inc., exported to the Republic of Mexico 15,424 cwt. of lima beans which Casaus had purchased from the Commodity Credit Corporation." The indictment charged the appellant with having made a statement to "Special Agent Doyle S. Kennedy, that as of October 6, 1954, Casaus, Inc., had exported to the Republic of Mexico 15,424 cwt. of lima beans which Casaus had purchased from the Commodity Credit Corporation, when in truth and in fact, as the defendant then and there will know, a much lesser quantity of beans had actually been exported to the Republic of Mexico by Casaus, Inc." Nowhere in Mr. Kennedy's testimony did he ever say that the defendant had made this statement to him. Mr. Kennedy reached a conclusion in his calculations but Mr. Casaus did NOT make the statement to him which is charged in the indictment.

Mr. Kennedy spent considerable time checking the records of Casaus, Inc., and he told Mr. Casaus that he wanted a written statement from him confirming his calculations but he did not receive any statement from Mr. Casaus containing the language which is charged in the indictment.

One cannot be convicted of a statement alleged with specificity in an indictment on a basis that a defendant made some other statement not specified in the indictment.

Such a procedure would be a sure violation of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States of America. (*Cole v. Arkansas,* 333 U. S. 196, 92 L. Ed. 644 of U. S. Reports.) Mr. Kennedy tried to get from Mr. Casaus a letter which would state in effect that he had made available to Mr. Kennedy all of the records with respect to all of his transactions in lima beans from March 1 up to that date and that the records were complete and accurate, and reflects Mr. Kennedy's findings therein, Reporter's Transcript, page 51 of Volume 3 dated April 19, 1956.

The conversation which Mr. Kennedy related took place with reference to the records was in November of 1954 and Mr. Kennedy conceded that the figures changed from day to day and what he was talking about were records from March 1, 1954 through November 15, 1954. [Rep. Tr. pp. 54 and 55, dated April 19, 1956.] There were numerous discussions between Casaus and Mr. Kennedy relating to Mr. Kennedy's accounting. Mr. Kennedy's accounting was conducted on December 13, 1954 [Rep. Tr. p. 75], and he was asking for a letter for the period from March 1, 1954 to November 15, 1954. [Rep. Tr. p. 76.] At no time did Mr. Casaus ever make the statement alleged in the indictment and at no time did Mr. Kennedy testify that Mr. Casaus made the express statement contained in the indictment. Therefore, the evidence is insufficient to support the verdict and a judgment of acquittal should be granted and ordered.

Where the Government specifies one statement it cannot thereafter convict on an entirely different statement not alleged in any indictment, nor upon mathematical calculations of an investigator of the Governmental Agency.

II.

There Was No Proof That the Defendant Made Any Statement for the Purpose of Obtaining Money or Property or Other Things of Value for Himself. There Was No Proof as to the "Lesser Quantity" Asserted by the Government.

There is no evidence that de Casaus, answering the investigating officer was doing it for the purpose of obtaining money or property or any other thing of value for himself. The lima beans had been fully paid for. There is nothing to show that de Casaus obtained any money or property or other thing of value for himself.

Nor is there any proof of the "lesser quantity" claimed by the government.

III.

The Rule of Perjury Requiring Two Witnesses to Any Alleged False Statement Should Apply.

There was only one witness to the purported conversation, to wit: Doyle S. Kennedy, the investigator and the defendant to whom he talked who contradicted him. The statute was not meant to apply to one person or to statements made to an investigating officer during the course of his inquiries.

The two witness rule, which is so essential in case of perjury, should apply to false statements in matters connected with affairs of the Government. The reason for the two witness rule in perjury cases is equally applicable to prosecution for making "false statements" and where the law exists the rule should apply.

This circuit has held, otherwise in previous decisions but since that time the Supreme Court of the United States has had before it, the case of *Ben Gold v. United States,* No. 137, Oct. Term, U. S. Supreme Court, in

which this point was raised. Although the *Gold* case was reversed on other grounds Justice Tom Clarke, however, urged the court to pass upon this question to whether false statements required and should require two witnesses to the false statements. That court's decision was left open.

IV.

The Statute Was Not Meant to Apply to Investigating Officers.

We do not think that the statute regarding false statements was meant to apply to comments and discussions with investigators, clerks, FBI agents and the persons in that category in the course of investigations.

United States v. Levin, 133 Fed. Supp. 88.

In *People v. Levin*, 133 F. Supp. 88. the court said:

> "[1] If the statute is to be construed as contended for here by the United States, the result would be far-reaching. The age-old conception of the crime of perjury would be gone. 18 U.S.C.A. §1621. Any person who failed to tell the truth to the myriad of government investigators and representatives about any matter, regardless of how trivial, whether civil or criminal, which was within the jurisdiction of a department or agency of the United States, would be guilty of a crime punishable with greater severity than that of perjury. In this case the defendant could be acquitted of the substantive charge against him and still be convicted of failing to tell the truth in an investigation growing out of that charge, even though he was not under oath. An inquiry might be made of any citizen concerning criminal cases of a minor nature, or even of civil matters of little consequence, and if he wilfully

falsified his statements, it would be a violation of this statute. It is inconceivable that Congress had any such intent when this portion of the statute was enacted. A literal construction of a statute is not to be resorted to when it would bring about absurd consequences, or flagrant injustices, or produce results not intended by Congress. *Sorrells v. United States*, 287 U. S. 435, 446, 53 S. Ct. 210, 77 L. Ed. 413. The lack of this intention is clearly illustrated from the fact that numerous statutes have been passed which authorize agents of different departments and agencies of the United States to administer oaths to those from whom they are seeking information. 5 U.S.C.A. §93 authorizes an officer or clerk of any of the departments lawfully detailed to investigate frauds on, or attempts to defraud the government or any irregularity or misconduct of any officer or agent of the United States to administer an oath to any witness called to give testimony. This authority was extended in 5 U.S.C.A. §93a. Special authority to administer oaths in the course of an investigation is given in the following statutes:

"5 U.S.C.A. §521 (Officers of Department of Agriculture who are designated by the Secretary); 5 U.S.C.A. §498 (Investigators with the Department of Interior); 7 U.S.C.A. §420 (Secretary of Agriculture or any representative authorized by him in the administration of the Cotton Futures Act, Grain Standards Act, Warehouse Act, and Standard Containers Act); 8 U.S.C. §152, now 8 U.S.C.A. §§1225(a), 1357(b) (Immigration inspectors with respect to aliens); 12 U.S.C.A. §481 (Federal Bank Examiners in examination of federal banks or affiliates thereof); 18 U. S.C.A. §4004 (Wardens, superintendents, and associates wardens of Federal Penal Institutions); 19 U.S.C.A. §1486 (Customs officer,

chief assistants or any employee of the Bureau of Customs designated by the Secretary of the Treasury, or in their absence, postmasters or assistant postmasters in matters involving less than $100); 26 U.S.C.A. §§3632(a) and 3654(a) (Collector, Deputy Collector of Internal Revenue, and agents and officers making investigations); 42 U.S.C.A. §272 (Medical Quarantine Officers of United States)."

V.

The Indictment as to Counts 4 Fails to State an Offense Against the Laws of the United States.

The indictment as to Count 4 merely charges defendant with making a certain false statement and then contains a conclusion of law that the defendant then and there did know that a much lesser quantity had been shipped to the Republic of Mexico. This is a sheer conclusion of the pleader and although indictments have been simplified, they still require facts to be alleged in the indictment under the Fifth Amendment to the Constitution of the United States of America. (*United States v. Debrow,* 346 U. S. 374, 98 L. Ed. 92.)

That an indictment must allege facts we believe is still the law and should apply. Here the statement of "much lesser quantity" was a sheer conclusion of the pleader. At the time of the indictment such facts were not presented to the Grand Jury and on its face, the indictment, therefore, fails to state an offense against the laws of the United States.

United States v. Williams, 203 F. 2d 572;
United States v. Lattimore, 112 Fed. Supp. 507;
United States v. Lattimore, 215 F. 2d 847.

VI.

The Court Erred in Denying Appellant the Request for a Bill of Particulars as to the "Much Lesser Quantity of Such Beans" or the Actual Quantity of Beans Which the Government Claims Had Actually Been Exported to the Republic of Mexico.

The defendant requested the information by Bill of Particulars as to what quantity of beans the Government claims had been shipped into Mexico. The request was denied. This was essential to meet the charges alleged in the indictment. It was a denial of a fundamental right, and would enable the defendant to know what he has to meet and meet the exact charge, Rule 7C, Rules of Criminal Procedure for District Courts of United States.

United States v. Smith, 16 F. R. D. 372;

United States v. Clark, 10 F. R. D. 622.

VII.

The Court Erred in Refusing to Allow the Defendant to Have the Government Records of the United States Customs Office Produced and Presented for Inspection and Use in the Trial. The Denial of the Right to Have Those Documents by the Government Requires It to "Dismiss the Case."

In the course of trial the major issue before the court was the number of lima beans shipped into Mexico by Casaus, Inc., and to show that a quantity equal or greater than the number alleged in the indictment had been shipped into Mexico to prove all of the shipments which had been made by Casaus, Inc. The defendant subpoenaed the U. S. Customs Office to bring its records into court.

The customs office produced the records in court but failed to testify regarding them on a claim of the Government that these records were confidential and privileged and, therefore, should not be permitted to be inspected by the defense for the purpose of meeting the charges. The defenses request was specific as to certain dates and certain months. The Government having elected to keep the records confidential rather than disclose them, elected to dismiss the case. *Jencks v. United States,* No. 23 of Decisions of the United States Supreme Court, announced June 3, 1957. Justice Brennan speaking for the court in that case said "We hold that the criminal action *must be dismissed when the Government,* on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial. Accord, *Roviaro v. United States,* 353 U. S. 53, 60-61. The burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession." We, therefore, on the basis of the *Jenks* case ask the Court to reverse the judgment and order the case dismissed.

VIII.

The Court Erred in Refusing to Allow the Defendant to Take Depositions in Mexico, as Requested by Defense Pursuant to Title 28, Section 1781 of the United States Codes.

Title 28. §1781, provides as follows:

> "Whenever a court of the United States issues letters rogatory on a commission to take a deposition in a foreign country, the foreign court or officer executing the same, may make return thereof to the nearest United States Minister or Consul, who shall endorse thereon the place and date of his receipt, and any change in the condition of the deposition, and transmit it to the clerk of the issuing court in the manner in which his official dispatches are transmitted to the United States Government."

> " 'Letters rogatory' are the medium whereby one country, speaking through one of its courts, requests another country, acting through its own courts . . . to assist the administration of justice. . . ." (*The Signe,* 37 F. Supp. 819.)

There is no reason to believe that the testimony thus taken would be untrue nor was it proper for the court to leave the jury with such an inference by giving it an instruction that there was no extradition treaty for perjury.

The court should have granted judgment of acquittal for the reasons hereinabove set out and we request this court to direct the court below to grant a judgment of acquittal. This was the procedure recently adopted by the United States Supreme Court in the case of *Oletha Yates, et al. v. United States,* in the session of June 17, 1957.

IX.

The Trial Court Erred in Refusing to Permit the Introduction Into Evidence of Mexican Landing Receipts Certified to by the Mexican Government. Said Proof Was Authorized by Government Regulation 212.

The court refused to allow documents authenticated in Mexico to be introduced in evidence although they were certified by the American Consul.

During the deliberations of the jury, the jury sent for the invoice books which had been referred to in the trial but not introduced into evidence. They were received by the jury, however, and discovery of this fact occurred when the trial judgment made it known himself during the hearing on a motion for a new trial and put the Deputy Marshal on the stand, who had delivered these documents to the jury. The court, however, held that that it was not prejudicial and denied the motion for a new trial.

The trial court erred in failing to admit into evidence the Mexican landing receipts which were certified by the American Consul in Mexico as correct and which went to establish the innocence of the defendant.

Wherefore, Appellant prays for reversal of the judgment below and an order to the court to dismiss the indictment.

X.

The Trial Court Erred in Not Granting a Judgment as to Count IV of Acquittal at the Close of the Government's Case and at the Close of the Entire Case. This Court Should Direct It to Enter a Judgment of Acquittal.

At the close of the government's case and at the close of defendant's case motions were made for judgment of acquittal and denied. In view of the total lack of evidence the court should have granted the motion. Since the evidence is entirely absent to sustain the judgment this court is requested to direct the court below to enter judgment of acquittal.

XI.

The Trial Court Erred in Denying a Motion for a New Trial When It Was Disclosed on the Motion for the New Trial That the Marshal Had Inadvertently Sent Exhibits to the Jury Room Which Had Not Been Introduced in Evidence.

These were not admitted in evidence and therefore they were improperly before the jury.

Wherefore appellant prays for reversal of the judgment and direction to the court below to enter judgment of acquittal.

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